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YEBET SAMAN & ORS v. FOONG KWAI LONG & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ RAHIM JCA
MAH WENG KWAI JCA
PRASAD SANDOSHAM ABRAHAM JCA
B [CIVIL APPEAL NO: C-01(NCVC)(A)(W)-416-12-2013]
4 DECEMBER 2014

C ***LAND LAW:*** *Customary land – Right to – Native right – Whether recognised in common law – Whether common law rights excluded by virtue of Aboriginal Peoples Act 1954 – Whether plaintiffs estopped from pleading applicability of common law – Whether common law rights of plaintiff could co-exist with the Aboriginal Peoples Act 1954 – Whether plaintiffs entitled to seek declaration of rights to occupy land in common law*

D ***NATIVE LAW AND CUSTOM:*** *Land dispute – Customary rights over land – Native right – Whether recognised in common law – Whether common law rights excluded by virtue of Aboriginal Peoples Act 1954 – Whether plaintiffs estopped from pleading applicability of common law – Whether common law rights of plaintiff could co-exist with the Aboriginal Peoples Act 1954 – Whether plaintiffs entitled to seek declaration of rights to occupy land in common law*

E ***CONSTITUTIONAL LAW:*** *Right to property – Customary land – Native right – Whether recognised in common law – Whether common law rights excluded by virtue of Aboriginal Peoples Act 1954 – Whether plaintiffs estopped from pleading applicability of common law – Whether common law rights of plaintiff could co-exist with the Aboriginal Peoples Act 1954 – Whether plaintiffs entitled to seek declaration of rights to occupy land in common law*

F The plaintiffs belong to the Semaq Beri subgroup of the 'Senoi' category of the orang asli. Their purported claim to the lands *ie*, Kampung Mengkapur, cover an area of 700 acres ('the said land'). The plaintiffs claimed that they
G have lived on and have had an interest in the said lands since 1850 and that they had maintained a close connection to their said lands through their continuous occupation and use of the same. The unlawful encroachment into the customary lands began in September 2010 when the plaintiffs discovered a notice containing the name of a contractor/agent of the second defendant
H and the details of his license to conduct logging activities in the south-western part of the said lands. Subsequently, and without the consent of the plaintiffs, the contractors/agents of the second defendant and/or the first defendant began cutting down the trees and removing timber from the said lands. Then, from 2011 onwards, the plaintiffs were verbally directed by the contractors/
I agents of the second defendant not to enter parts of their said lands. Moreover, the contractors/agents of the second defendant refused to adhere to the plaintiffs' demands to desist from trespassing on the said lands and to vacate as well as remove all equipment and/or machinery from the said lands. The plaintiffs thus commenced the instant action in the High Court,

which was dismissed. Hence, this appeal. The plaintiffs claimed that the plaintiffs' customary title was recognised in common law and that the said lands were distinctive to the plaintiffs' culture. The defendants argued that common law rights had been excluded by virtue of the Aboriginal Peoples Act 1954. According to the defendants, with the advent of the said Act, the same provides for the rights of the plaintiffs exclusively and therefore the plaintiffs were estopped from pleading and averring to the applicability of the common law.

Held (allowing appeal)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) The Aboriginal Peoples Act 1954 ('the Act') does not anywhere provide that it had been passed to exclusively deal with the issue of aboriginal peoples' rights. Common law rights of the plaintiffs could co-exist with the Act (*Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors,* refd; *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh (suing as Administrator of the Estate of the Deceased, Salleh Kilong,* refd*)* The plaintiffs were entitled to seek declaration of rights to occupy and use of the said land in common law. The plaintiffs' rights vested in them, in common law, a right to derive their livelihood from the said land which was not excluded by the said Act. (paras 8, 9 & 12)

[Matter remitted to the High Court to be heard on issues of facts raised.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif tergolong dalam kumpulan kecil Semaq Beri yang terdapat dalam kategori orang asli 'Senoi'. Mereka mendakwa bahawa mereka mempunyai tuntutan ke atas tanah-tanah iaitu Kampung Mengkapur yang meliputi kawasan seluar 700 ekar ('tanah tersebut'). Plaintif-plaintif mendakwa bahawa mereka telah menduduki dan mempunyai kepentingan ke atas tanah tersebut sejak 1850 dan bahawa mereka telah mengekalkan kaitan rapat mereka dengan tanah-tanah tersebut melalui pendudukan dan penggunaan yang berterusan ke atasnya. Pencerobohan menyalahi undang-undang ke atas tanah adat itu bermula pada September 2010 apabila plaintif-plaintif menemui satu notis yang mengandungi nama kontraktor/ejen defendan kedua dan butir-butiran lesen untuk menjalankan aktiviti pembalakan di kawasan barat selatan tanah tersebut. Seterusnya, dan tanpa kebenaran plaintif-plaintif, kontraktor/ejen defendan kedua dan/atau defendan pertama mula menebang pokok-pokok dan mengeluarkan kayu balak dari tanah tersebut. Selanjutnya, dari 2011 dan seterusnya, plaintif-plaintif telah secara lisan diarahkan oleh kontraktor/ejen defendan kedua untuk tidak memasuki sebahagian tanah mereka. Tambahan pula, kontraktor/ejen defendan kedua enggan mematuhi tuntutan plaintif untuk berhenti daripada mencerobohi tanah-tanah tersebut dan untuk mengosongkan dan mengeluarkan segala peralatan dan/atau jentera dari tanah tersebut. Plaintif-plaintif kemudiannya memulakan tindakan ini di Mahkamah Tinggi, yang kemudiannya telah ditolak. Oleh itu, rayuan ini.

Plaintif-plaintif mendakwa bahawa hakmilik adat plaintif-plaintif diiktiraf dalam undang-undang lazim dan bahawa tanah tersebut adalah distingtif dengan budaya plaintif. Defendan menghujahkan bahawa hak undang-undang lazim telah dikecualikan menurut Akta Orang Asli 1954. Menurut defendan-defendan, kemunculan Akta tersebut memperuntukkan hak-hak plaintif secara eksklusif dan dengan itu plaintif-plaintif diestop daripada memplid dan menegaskan kebolehgunaan undang-undang lazim.

Diputuskan (membenarkan rayuan)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Akta Orang Asli 1954 ('Akta') tidak memperuntukkan bahawa ia telah diluluskan untuk menangani isu hak orang asli secara ekslusif. Hak undang-undang lazim plaintif-plaintif boleh wujud bersama dengan Akta tersebut (*Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors*, dirujuk; *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh (suing as Administrator of the Estate of the Deceased, Salleh Kilong*, dirujuk). Plaintif-plaintif berhak untuk menuntut deklarasi hak-hak untuk menduduki dan menggunakan tanah tersebut dalam undang-undang lazim. Hak-hak plaintif yang terletak hak pada mereka, dalam undang-undang lazim, adalah hak untuk memperolehi mata pencarian mereka daripada tanah tersebut yang tidak dikecualikan oleh Akta tersebut.

[Perkara diremitkan ke Mahkamah Tinggi untuk mahkamah tersebut mendengar isu-isu fakta yang dibangkitkan.]

Case(s) referred to:

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors, reported in [1998] 2 CLJ 665 CA ***(foll)***

Raja Mokhtar Raja Yaacob v. Public Trustee, Malaysia [1970] 1 LNS 126 HC ***(refd)***

Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC ***(refd)***

For the plaintiffs - Steven Thiru (Yogeswaran Subramaniam, R Sarengapani, Darmain Segaran & Lee Lyn Ni with him); M/s RS Pani & Assocs

For the 1st & 2nd defendants - Nor Zakiah Abdul Majid; M/s Zakiah

For the 3rd & 5th defendants - Ahmad Hanir Hambaly (Rohatul Akmar Abdullah with him); State Legal Advisor, Pahang

For the 4th & 6th defendants - Noor Hisham Ismail (Kairul Fazly Kamarudin with him); AG's Chambers

[Editor's note: For the High Court judgment, please see Yebet Saman & Yang Lain lwn. Foong Kwai Long & Yang Lain [2014] 6 CLJ 795.]

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] This appeal arises out of a decision of the High Court dated 29 October 2013, dismissing the plaintiffs claim with no order as to costs as agreed between parties hence the appeal before us. For purposes of convenience we will refer to the appellants as the plaintiffs and the respondents as the defendants.

[2] This appeal raises several interesting points of law and fact over the plaintiffs claim to the said land, the subject matter of this dispute based on common law and customary rights.

[3] The Background Facts

(i) The plaintiffs belong to the Semaq Beri subgroup of the 'Senoi' category of the Orang Asli (see pp. 135 to 136, AR 2(1)).

(ii) Their purported claim to the said lands (ie, Kampung Mengkapur) cover an area of approximately 7,000 acres (the said land). It includes two primary settlement areas namely, 'Chahabuk' and 'Tumpesel'. Apart from settlements, there are also grave sites, orchards and ancestral ceremonial sites on the customary lands. A detailed description of the said lands is set out in pp. 138 to 1440, AR 2(1).

(iii) The plaintiffs claimed they have lived on and have had an interest in the said lands since at least 1850 (see para. 8, p. 141, AR, 2(1).

(iv) The plaintiffs also claimed that they have maintained a close connection to their said lands through their continuous occupation and use of the same. Various flora and fauna on the said lands (and in fact the said land itself) are used as part of the plaintiffs customs and practices. The Semaq Beri of Kampung Mengkapur are inextricably linked to the customary lands (see pp. 146 to 154, AR, 2(1)).

(v) During the emergency (1948), the plaintiffs' ancestors were forced by the government to relocate to Kampung Paya Bungor and were informed that such relocation would only be temporary. Kampung Paya Bungor is located about twelve (12) kilometres away from the customary lands (pp. 142 to 143, AR, 2(1)).

(vi) It is noteworthy that the plaintiffs' ancestors never abandoned the customary lands during this period as they continuously returned to the said lands to tend to/harvest their orchards for collection of forest produce, for hunting and fishing, and to visit and maintain places of cultural, spiritual and religious importance (see pp. 143 to 144, AR 2(1)).

(vii) In 1970, after the end of the emergency, a number of the Semaq Beri of Kampung Mengkapur households returned permanently to the customary said lands and continued to occupy the same (see p. 144, AR 2(1)).

(viii) It is noted that the matters stated above concerning the plaintiffs as members of the Semaq Beri tribe and their occupation of, and interest in, the said lands are also found in the expert evidence of Dr Collin George Nicholas, an independent expert on the socio-historical aspects of the Orang Asli community (see pp. 180 to 189, AR 2(1))

(ix) The unlawful encroachment into the customary lands began in mid-September 2010. The plaintiffs discovered a notice containing the name of a contractor/agent of the second defendant and the details of his license to conduct logging activities in the south-western part of the said lands (see para. 44, p. 155, AR 2(1))

(x) Next, the plaintiffs also found that contractors/agents of the second defendants and/or the first defendant had placed stone markers and paint markers on forest trees in various locations in the said lands for the intended logging activities (see para. 45 pp. 155 to 156, AR 2(1)).

(xi) Subsequently, and without the consent of the plaintiffs, the contractors/agents of the second defendant and/or the first defendant began cutting down the trees and removing timber from the said lands. Further, they had also begun clearing parts of the said land and planting oil palm. The plaintiffs made police reports (see paras. 46 and 47, p. 156 AR 2(1)).

(xii) Then, from mid-2011 onwards, the plaintiffs were verbally directed by the contractors/agents of the second defendant not to enter parts of their said lands which had been cleared as stated above (see para. 48, p. 157, AR 2(1)).

(xiii) Moreover, the contractors/agents of the second defendant refused to adhere to the plaintiffs demands, through their solicitors, to desist from trespassing on the said lands and to vacate as well as remove all equipment and/or machinery from the said lands (see paras. 49 to 50. p. 157, AR 2(1))

(xiv) In or around December 2011, the second defendant and/or the first defendant further encroached into the said lands approximately two kilometres away from the Tumpesel and Chahabuk villages (see para. 51, p. 158. AR 2(1)).

(xv) The plaintiffs then commenced the instant action in the High Court on 14 December 2012 (see pp. 20 to 94 AR 1 and pp. 95 to 163, AR 2(1)).

(xvi) None of the defendants have disputed the encroachment of the plaintiffs the said land.

Issues Pertaining To The Customary Rights Of The Plaintiffs To The Said Land And In Common Law

[4] The question to be first asked does such a right exist. The plaintiffs' claim is that the plaintiffs' customary title are recognised in common law provided it can be shown the existence of distinctive aboriginal communities occupying the said land as their forefathers had done before what this means, evidence that shows that whether the said land had been continuously occupied by the plaintiffs and their families who had inherited the said land from their forefathers. The traditions and customs of the Semaq Beri tribe have been maintained by the plaintiffs from generation to generation. The plaintiffs have occupied the said land since the 1850s and the said land are distinctive to the plaintiffs' culture.

[5] The defendants and in particular the fourth to the sixth defendants have invited the court to revisit all the authorities on this point. Senior Federal Counsel ('SFC') argues that common law rights have been excluded by virtue of the Aboriginal Peoples Act 1954 (Act 734) revised July 1974 ('the said Act'). The argument of the SFC for the defendants is that with the advent of the said Act the same provides for the rights of the plaintiffs exclusively and therefore the plaintiffs are estopped from pleading and averring to the applicability of the common law. The defendants have also raised several issues of facts and law in relation to the plaintiffs' right.

[6] The plaintiffs argue that the rights of the plaintiffs are crafted on principles of common law. This is supported by several decisions of the Federal Court and the Court of Appeal and decisions of the Australian High Court and other Commonwealth jurisdictions which were referred to us. In the case of *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors*, reported in [1998] 2 CLJ 665; [1998] 2 MLJ p. 158 a decision of the Court of Appeal where it was held:

> (1) The court entirely agreed with the views expressed by the judge upon the issue of liability. Those views accorded with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. The judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art. 13 of the Federal Constitution.

[7] The decision was upheld by the Federal Court when leave to appeal was refused. The focus of the court's attention in the aforesaid case is the concept of "aboriginal inhabited place" under the said Act. We observe that the arguments of the Senior Federal Counsel (SFC) for the fourth and sixth

defendants mirror exactly what the SFC argued in *Adung Kuwau*'s case and we quote from the judgment of His Lordship Gopal Sri Ram JCA (as he then was) in delivering the leading judgment of the court:

> The Act makes it plain that it does not exclude the rights vested in the respondents at common law. The appellants' argument was fallacious because ss. 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case was not based upon a claim that the land in question was an aboriginal area. They relied upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place' (see p. 164D-I).

The first of these passages appears at p. 50 of the appeal record and reads ([1997] 1 MLJ 418 at p. 430):

> My view is that, and I get support from the decision of *Calder*'s case [*Calder v. A-G of British Columbia* (1973) 34 DLR (3d) 145] and *Mabo*'s case [*Mabo & Ors v. State of Queensland & Anor* (1986) 64 ALR 1], the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in *Calder*'s case at p. 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished...'. I would agree with this *ratio* and rule that in Malaysia the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

The next passage is at pp. 52-53 of the appeal record ([1997] 1 MLJ 418 at pp. 430-431). In it the judge said:

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s. 11 of the Act, guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In

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the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

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The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

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The third passage, which is at p. 59 of the appeal record ([1997] 1 MLJ 418 at pp. 433-434), reads:

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I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art 13(1).

At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu valley, the plaintiffs' rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognized in law. It is the building of the dam that brought the plaintiffs' freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution art 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognized at common law and statutory law.

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The plaintiffs' statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that there was a break in the continuous occupation and traditional connection in the land for their livelihoods.

It has been long recognized under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

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The final passage is at p. 65 of the record of appeal ([1997] 1 MLJ 418 at p. 436). It reads:

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For a case involving the plaintiffs, I would state that the plaintiffs had suffered deprivation of the following types of interest in the land:

(1) deprivation of heritage land;

(2) deprivation of freedom of inhabitation or movement under art 9(2);

(3) deprivation of produce of the forest;

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(4) deprivation of future living for himself and his immediate family; and

(5) of future living for his descendants.

We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. See *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

We are therefore unable to agree with the submissions of the learned State Legal Adviser and his criticism of the learned judge's judgment. A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by counsel for the respondents during argument before us, the Act in s 2 creates a distinction between an 'aboriginal area' and an 'aboriginal inhabited place'. These are defined as follows:

> 'Aboriginal area' means an aboriginal area declared to be such under this Act.
>
> 'Aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.

Sections 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place'.

[8] We subscribe to the views expressed by His Lordship in the Court of Appeal in *Adung*'s case. We observe also that the said Act does not anywhere provide that the said Act has been passed to exclusively deal with the issue of Aboriginal Peoples' rights. By way of analogy, the National Land Code provides an exclusive machinery for registration of title in Peninsular Malaysia and we quote:

> An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah,

> Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur and for purposes connected therewith.

[9] It follows that common law rights of the plaintiffs can co-exist with the said Act. We also considered the following cases in support of that proposition ie, *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ p. 555; *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509; [2008] 2 MLJ at p. 677.

[10] SFC acting for fourth and the sixth defendants invited this court to revisit this area of the law and argued quite forcibly that common law has no place in addressing the plaintiffs' claims, as they would be governed by the said Act. However we are unable to agree, in view of the present state of authorities on the point. We are bound by the decisions of the Federal Court and would adopt the principles enunciated in those cases. Further decisions from common law jurisdictions are instructive. In this regard we are reminded of the words of Raja Azlan Shah J (as His Royal Highness then was) in the case of *Raja Mokhtar Raja Yaacob v. Public Trustee, Malaysia* [1970] 1 LNS 126; [1970] 2 MLJ 151, where he said and we quote:

> Although the decisions of the Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in the Australian and English cases so that the common law and its development should be homogeneous in the various sections of the Commonwealth.

[11] We would therefore hold that the plaintiffs are entitled to seek declaration of rights to occupy and use of the said land in common law.

[12] We therefore disagree with the learned judge and hold that the plaintiffs' rights vested in them, in common law, a right to derive their livelihood from the said land which is not excluded by the said Act. On that ground we would allow the appeal.

[13] However to determine the sustainability of the plaintiffs' claim, or the absence of it, several issues have been raised in the various affidavits filed in support of the respective parties and they can be encapsulated as set out below:

(a) Whether the plaintiffs were in continuous occupation of the said land;

(b) Whether the plaintiffs had abandoned or waived their prescriptive rights under common law; or

(c) Any other factual issues that may have a bearing on the plaintiff's case.

[14] The various affidavits filed contain issues of fact that need to be resolved by *viva voce* evidence and the learned judge should have converted this matter to a writ and justice could have been better served. It is our view this matter

should have been disposed of by way of oral evidence. We echo the words of the Supreme Court in the case *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* reported [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331; [1992] 2 MLJ 217 from which we quote at p. 232:

> We have given anxious consideration to the facts of this case and submissions of both counsel on the point under discussion, and in the light of the view that we have taken and the uncertainties of the various facts as they are made available before the court, and in view of the authorities cited above, we have come to the conclusion that the better decision under the circumstances is to allow the appeal, and pursuant to O. 28 r. 8(1) order the proceedings to continue as if begun by writ and the parties to deliver their pleadings in accordance with O. 18 and that the order made by the learned judge should be set aside.

On the upshot the appeal is allowed:

(i) With no order as to costs;

(ii) The matter is remitted to the High Court to be heard on the issues of fact raised, by a different judge;

(iii) We direct the affidavit in support of the originating summons affirmed on 14 December 2012 to stand as the statement of claim, the affidavit in reply of each of the defendants to stand as their defence respectively, and subsequent affidavits filed to constitute subsequent pleadings; and

(iv) Early trial of this matter is hereby ordered.